



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 457 OF 2017**

INAMOL JESUS BERAKOETXEA.....1<sup>ST</sup> PLAINTIFF

VICTOR SHIHOLO MUHANDIKI.....2<sup>ND</sup> PLAINTIFF

NAZIR AHMED LONE.....3<sup>RD</sup> PLAINTIFF

**VERSUS**

EDWARD BURIA.....1<sup>ST</sup> DEFENDANT

JOHN KAMAU WAINAINA.....2<sup>ND</sup> DEFENDANT

MAGNOLIA HEIGHTS MANAGEMENT.....3<sup>RD</sup> DEFENDANT

**RULING**

[1] Before the Court for determination is the Notice of Motion dated **24 November 2017**. That application was filed herein by the Plaintiffs under **Sections 1A, 1B, 3A, 63(e) and 100 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 1 Rule 10(2), Order 8 Rule 3, 4, 5, and 7 as well as Order 51 Rule 1 of the Civil Procedure Rules, 2010**, for Orders that:

[a] The Court be pleased to grant leave to the Plaintiffs to amend its Notice of Motion application dated **10 November 2017** in terms of the Draft Amended Notice of Motion annexed to the application;

[b] The Draft Amended Notice of Motion be deemed as duly filed and served after payment of the requisite fee;

[c] The costs of the application be provided for.

[2] In the Supporting Affidavit filed with the application, sworn by **Nazir Ahmed Lone**, the 3<sup>rd</sup> Plaintiff herein, it was averred that this suit was instituted on **10 November 2017** with the main purpose of stopping the Extraordinary General Meeting which had been called by the Defendants for **10 November 2017**, on the grounds, inter alia, that the Defendants had failed to provide the Plaintiffs with the necessary documents to enable them effectively discuss the issues of concern to members of the 3<sup>rd</sup> Defendant at the general meeting of the Company; and that the amendments being sought are intended to set out the documents which are being sought from the Defendants. It was therefore the contention of **Mr. Lone** that the proposed amendments would not occasion any prejudice to the Defendants and should therefore be granted in the interest of justice.

[3] The application was opposed by the Defendants. In their Grounds of Opposition dated **28 November 2017**, it was contended by the Defendants that the application is bad in law, incompetent, misconceived and an abuse of the process of the Court because the application sought to be amended is largely spent, since all the substantive orders sought therein have been granted; and therefore, to allow the same would have the effect of sneaking in a new prayer. It was further averred that the application dated **24 November 2017** is fatally defective since the Supporting Affidavit does not make reference to any annexure. It was thus posited by the Defendant that the Court's jurisdiction had not been properly invoked and that the Plaintiffs having failed to comply with the mandatory provisions of the law. They thus urged for the dismissal of the application with costs.

[4] The application was disposed of by way of written submissions which I have carefully considered. In the Plaintiffs' written submissions dated **30 November 2017**, reference was made to **Order 3 Rule 2 and Order 8 Rule 5(1) of the Civil Procedure Rules** in support of the

proposition that amendments of pleadings may be done at any time during the proceedings for the purpose of determining the real question in controversy between the parties. The case of **John Ochieng' & 2 Others vs. First National Bank of Chicago Civil Appeal No. 149 of 1991** and **Eastern Bakery vs. Catelino [1958] EA 46** were also cited by the Plaintiffs to accentuate their arguments.

[5] As for the procedural anomalies noted by the Defendants, in particular the alleged breaches of **Rule 9** of the **Oaths and Statutory Declarations Rules**, the Plaintiffs' Counsel urged the Court not to permit what would, in effect, be the elevation of procedural technicalities above substantive justice; and that should the Court find that there is indeed an irregularity in this regard, then **Order 19 Rule 7** should come in handy to cure the anomaly, as was the case in **George C.M. Kariithi & 2 Others vs. Co-operative Bank (K) Ltd [2006] eKLR** in which it was held that:

**"The bottom line is that there ought to be no confusion as to what is being relied upon either by a witness giving oral evidence or by a deponent of an affidavit. I find that in the present affidavit there cannot be said to be any such confusion."**

[6] The Defendants' written submissions, on the other hand, were filed on **19 December 2017** in which it was reiterated that, the Court having granted to the Plaintiffs the orders they sought in their initial application, the instant application for amendment is without basis and has been made *mala fides* to serve ulterior selfish interests. It was further submitted that there is no reference that has been made in the Supporting Affidavit to any annexure; and therefore the alleged annexure attached to the application ought not to be relied on, for the reason that it has not been placed before the Court in accordance with the rules of procedure; in particular **Rule 9** of the **Oaths and Statutory Declarations Rules**. On the importance and purpose of the Rules, Counsel relied on **Fredrick Mwangi Nyaga vs. Garam Investments & Another [2013] eKLR**.

[7] The application was filed pursuant, inter alia, to **Order 8 Rules 3(1)** of the **Civil Procedure Rules**, which provides that:

**"...the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings."**

And **Rule 5(1)** in particular provides that:

**"For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."**

[8] The rationale for amendment of pleadings need not be belaboured; it is so that the Court can then effectively and effectually determine the issues in controversy between the parties to the suit; and therefore should be freely allowed, especially if made before the commencement of the hearing. Thus, in **Nyamodi Ochieng Nyamogo vs Kenya Posts and Telecommunication Corporation [2007] eKLR**, it was held that:

**"The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between the parties is conducted not on false hypothesis of the facts already claimed but rather on the basis of the true state of facts or relief or remedy which the parties really and finally intend to rely on or to claim."**

[9] Accordingly, if the Court is satisfied that good cause has been shown for it, it ought to allow an amendment. Indeed, in **Eastern Bakery vs. Castelino [1958] EA 461** it was held that:

**"...amendment to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.."**

[10] Needless to say that what is sought to be amended is not a pleading, properly so called, but a Notice of Motion. This is because, for purposes of the **Civil Procedure Act** and the **Rules** thereunder, a "pleading" is defined in **Section 2** as including:

**"...a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant;"**

[11] In **Fredrick Mwangi Nyaga vs. Garam Investments & Another [2013] eKLR**, **Havelock, J.** was of the view, which I would endorse, that:

**"...I consider this definition to be absolutely clear as to what amounts to a pleading and that it is the process of instituting and defendant a suit as provided for under the Rules...it does not include what may be termed interlocutory applications including Chamber Summonses and Notices of Motion."**

[12] Accordingly, I would come to the conclusion, as did **Havelock, J.** in the **Fredrick Mwangi Nyaga Case** (supra) that **Order 8 Rule 3** of the **Civil Procedure Rules** is not the appropriate provision to come under for amendment of a Notice of Motion. Indeed, I subscribe to the view that where there is need to change tack, the proper thing to do would be for a litigant to withdraw the pertinent Notice of Motion and file a fresh application in its stead. Nevertheless, the Court does have powers by dint of **Section 100** of the **Civil Procedure Act**, to allow such amendment as has been sought herein, if to do so would further the interests of justice. That section provides that:

**"The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."**

[13] I further find succour in the decision of the Court of Appeal in Echaria vs. Echaria Civil Appeal No. 247 of 1997, in which it was observed that:

**"We agree that the Notice of Motion is defective, that the defect is curable for that reason, and Ms Karua having applied for leave to amend the Notice of Motion, we grant leave for the respondent to amend the Notice of Motion..."**

[14] In effect therefore, the Court of Appeal thereby sanctioned the amendment of a Notice of Motion; and as was aptly stated by **Apaloo, JA** in Philip Chemwolo vs. Augustine Kubende[1985] KLR 492, the duty of the Court is to do justice to the parties and not to punish them for their mistakes or omissions. The Learned Judge expressed his viewpoint thus:

**"I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."**

[15] Thus, having found that the application is competently before the Court, and granted the submissions and arguments made by Learned Counsel herein, the merits application would turn on the following issues:

[a] Whether the application sought to be amended is already spent and therefore the instant application is *mala fides*; and

[b] Whether the application is an affront to the mandatory provisions of **Rule 9** of the **Oaths and Statutory Declaration Rules**;

**On whether the initial application is spent:**

[16] The application sought to be amended, dated **10 November 2017** sought the following orders:

[a] That the application be certified urgent and heard *ex parte* in the first instance;

[b] That pending the hearing and determination of the application, the Court be pleased to issue an order of injunction, restraining the Defendants from holding an Extraordinary General Meeting scheduled on **10 November 2017** at 5.00 p.m.;

[c] That the Court be pleased to order the directors of the 3<sup>rd</sup> Defendant to issue a fresh notice of the Extraordinary General Meeting to be convened within 60 days of such court order;

[d] That the costs of the application be provided for.

[17] The parties appeared before the Court on **14 November 2017** for *inter partes* hearing and thereupon compromised the application, in that the Defendants conceded to a fresh EGM being held in 60 days, noting that by that time Prayers 1 and 2 of the Notice of Motion were spent. Accordingly, all that remained of the initial application was an order on costs. In the proposed Amended Notice of Motion, the Plaintiffs have sought to introduce Paragraph 2A, thereby seeking for orders that:

**"The Defendants by their servants, agents and employees, at least 21 days before the Extraordinary General Meeting scheduled as per Prayer No. 3, be ordered to give access to the Plaintiffs copies of all management records as set out in that paragraph."**

[18] It is manifest therefore, that the initial application was, for all purposes and intents, spent by the time the proposed amendment was made. It is also manifest that the proposed amendment would completely so change the complexion of that application as to convert it to a whole new and fresh application; and is therefore untenable.

**On whether the application offends the provisions of Rule 9 of the Oaths and Statutory Declarations Rules:**

[19] The Defendants' argument was that, in the affidavit filed in support of the application for amendment, there is no reference to any annexure; and therefore that the document annexed thereto and which the Plaintiffs sought to rely on is a mere flypaper that ought not to be relied on by the Court. Counsel relied on the Fredrick Mwangi Nyaga Case (supra) for the proposition that the rules are designed to facilitate justice and further its interests and should therefore not be ignored as if they did not exist. The said **Rule 9** of the **Oaths and Statutory Declaration Rules** reads thus:

**"All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters of identification."**

[20] There is no gainsaying that this provision was not headed by the Plaintiffs. There is a set of documents that were filed along with the Plaintiffs' application dated **24 November 2017**, including the Draft Amended Notice of Motion. Yet nowhere in the Supporting Affidavit of **Nazir Ahmed Lone**, is there any reference to those annexures. Whereas **Article 159(2)(d)** of the Constitution brought with it a fundamental shift in the manner cases are handled, namely that justice is to be administered henceforth without undue regard to procedural technicalities, it is also true that there has to be a structured way for the river of justice to follow. Hence, I would fully adopt the words of **Kiage, JA** in Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR that:

**"I am not in the least persuaded that Article 159 of the Constitution and the Oxygen Principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost effective manner...were ever meant to aid in the**

**overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice...it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity.”**

[21] Accordingly, since the annexures were not properly and procedurally introduced for consideration by the Court in accord with **Rule 9** aforementioned, it would follow that the Notice of Motion for amendment would be hollow. I note that Counsel for the Plaintiffs relied on **George C.M. Kariithi & 2 Others vs. Co-operative Bank (K) Ltd 2006] eKLR** for the proposition that so long as there is no confusion as to what is being relied upon, the annexure should be taken on board. However, that decision is also explicit that **“...there ought to be no confusion as to what is being relied upon either by a witness giving oral evidence or by a deponent of an affidavit...”** In this instance the Deponent of the Supporting Affidavit made no reference to the annexures at all. In effect therefore there is a **“no relying upon”** at all by the Deponent.

[22] For the reasons aforestated, it is my finding that the Plaintiffs' Notice of Motion dated **24 November 2017** is completely lacking in merit. The same is hereby dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2018**

**OLGA SEWE**

**JUDGE**